SUPREME COURT, U.S.
FILED
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IN THE

Supreme Court of the United States

OCTOBER TERM—1961

No. 887

THOMAS DI DONATO,

Petitioner,

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioner Thomas Di Donato respectfully shows to this Honorable Court the following:

Argument

In the footnote on page 3 of the Government's brief the Prosecutor conceded there is nothing in the record to indicate the basis for Petitioner's arrest. The Prosecutor further conceded that the Petitioner was not arrested on the counterfeit charge and that the detectives did not realize until after they arrived at the precinct station that the

bills taken from Petitioner were counterfeit nor was any reason advanced why the arrest was made clearly shows the arrest was illegal further substantiated by the lack of a warrant of arrest and a search warrant.

The Government thereby conceded there was no probable cause for the arrest and the record further demonstrates the same clearly and without question (85, 86, 87) that probable cause did not exist for the arrest of the Petitioner and since there was no arrest warrant or a search warrant, the evidence so seized is illegal. In *Di Bella* v. *United States*; at 369 U. S. 121, the Court sets forth clearly that the legality of the search too often cannot truly be determined until the evidence at the trial has brought all circumstances to light and cited *In re Milburn*, 77 F. 2d 310 (1935), and *Grout* v. *United States*, 291 F. 2d 727 (1961). In the case at bar the two New York City detectives who brought Di Donato out of the bar at 50th Street and searched him remained unknown even at the date of the trial wherein could they have been known at the time any motion to suppress was to have been made prior to trial.

A search which is "unreasonable" for want of probable cause cannot be made reasonable by what the search uncovers. In law, it is good or bad when it starts and does not change character from its success. It is not made reasonable by what it brings to light (*Byars* v. *United States*, 273 U. S. 28; *Dire* v. *United States*, 331 U. S. 581; *Johnson* v. *United States*, 333 U. S. 10; *McDonald* v. *United States*, 335 U. S. 451; *People* v. *De Vasto*, 198 App. Div. 620. Perhaps there may be observable in the State decisions a tendency to be less exacting when the search uncovers evidence of a serious crime but the law recognizes no such standard. For by such a standard every unreasonable search and seizure would be validated if the police find evidence of a serious crime. Such a result can hardly be to discourage police violation of the constitutional protection.

The determination of probable cause must be based solely on facts and circumstances known to the arresting officer *before* the arrest or in case of a crime committed in his presence; contemporaneously with the arrest.

In the case at bar no words could validate the arrest. It was illegal at the start.

The crux of the matter is that no probable cause existed for the arrest and the Government's case rises or falls on the proof submitted as to why the arrest was made or what the probable cause of the arrest was! No proof was offered by the Government and is so conceded.

At the trial the main witness for the Prosecution, Martino, a detective of the City of New York proved to the Trial Court that there was no probable cause which compels a Court in the upholding of the law to dismiss the indictment. If Martino had not proved there was no probable cause then of course the Petitioner's application for a Writ of Certiorari would be without merit. Rule 41(e) or no rule, the simple fact remains that there was no probable cause for the arrest and accordingly the indictment must be dismissed and should be in the upholding of the law. Throughout the trial defense counsel made repeated motions to exclude the evidence, the counterfeit bills, based on *Mapp* v. *Ohio*, 367 U. S. 645.

Even absent the motion to suppress would not the search be illegal and the *Di Re* v. *United States*, 332 U. S. 581, be in point respecting the search of a person without probable cause in violation of the 4th amendment. The main brief for the defendant-appellant supports this contention.

The Government in its brief in opposition to the granting of the Writ states on page 9 in the last paragraph "as noted the Court repeatedly instructed the jury that the Government bore the burden of proving guilt beyond a reasonable doubt"—a term which is explicitly defined.

This is not the fact and the true fact is that the District Court lightly skimmed over the question of reasonable doubt and avoided a clear-cut definition and explanation of what reasonable doubt is. The Circuit Court for the Second Circuit states in its opinion "However, when an objection is made, the trial judge ought to utilize the opportunity provided to correct oversight and to clarify the law for the jury. This is especially important in criminal cases in which the liberty of the defendant may depend upon every word the judge may say,—or fail to say. For a judge must "be a light to jurors to open their eyes . . . ."

The entire legal profession is in accord with such a statement, however, the Circuit Court of Appeals for the Second Circuit refused to follow the *Williams* case for the reason that this case at bar was simple and because of the harmless error doctrine. The District Court Judge however, felt and did express that the legal points were complex, and certainly the failure to explain the course that a juror or jury must take if it believes that there is a reasonable doubt is not harmless error if it is ignored and wantonly disregarded.

In no part of the charge (Deft's. R. 9A to 14A, inclusive) was there a single utterance by the Court that the jury must return a verdict of not guilty if it believes from the evidence that the defendant is innocent or that the Government failed to prove the elements of the crime beyond a reasonable doubt. In a case directly in point the Court stated in *Williams* v. *United States*, 131 F. 2 21, that "In no part of the charge was the jury even told that it could return a verdict of not guilty. That is error. But more than a mere statement that defendant can be acquitted is necessary. The jury must be told at least once in some unequivocal language that if it believes from the evidence that defendant is innocent or if it believes from the evidence that the Government has not proved each and every element of the crime beyond a reasonable

doubt it must return a verdict of not guilty." (See also *McKenzie* v. *United States*, 126 F. 2d 538; *United States* v. *Searcey*, 26 F. 435.) This was not done in the case at bar (Deft's. R. 9A to 16A, inclusive).

CONCLUSION

For the reasons stated it is respectfully submitted that the petition for a Writ of Certiorari should be granted.

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Attorney for Defendant-Appellant.